

## HOUSE OF REPRESENTATIVES LOCAL BILL STAFF ANALYSIS

**BILL #:** HB 947 Volusia County  
**SPONSOR(S):** Leek  
**TIED BILLS:** **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Local Administration Subcommittee	11 Y, 0 N	Moehrle	Miller
2) State Affairs Committee			

### SUMMARY ANALYSIS

Florida Statutes generally prohibit vehicular traffic on “dunes or native stabilizing vegetation of the dune system of coastal beaches.” With certain exceptions, vehicular traffic is prohibited on coastal beaches except where a local government with jurisdiction over a coastal beach or portions of a coastal beach “authorized such traffic, by at least a three-fifths vote of its governing body, on all or portions of the beaches under its jurisdiction...” prior to 1985. This does not apply to counties that adopted unified countywide beach regulations prior to January 1, 1988, pursuant to a county home rule charter.

A local government that authorized vehicular traffic on all or portions of its beaches may later prohibit such traffic on all or portions of the beaches under its jurisdiction. Local governments may charge a reasonable fee for vehicular traffic beach access. The revenues from any fees shall only be used for “beach maintenance; beach-related traffic management and parking; beach-related law enforcement and liability insurance; or beach-related sanitation, lifeguard or other staff purposes.” Except where authorized by the local government, any person driving any vehicle on, over, or across the beach shall be guilty of a second degree misdemeanor. As authorized by law, Volusia County regulates vehicular access to the county’s coastal beaches.

Although a lawful and traditional activity in Volusia County, beach driving has the potential to impact sea turtles and their nesting habitat, as well as the critical wintering habitat of the piping plover, a threatened species. These impacts are prohibited “takings” under the federal Endangered Species Act (ESA), for which Volusia County was required to apply for an Incidental Take Permit (ITP) in February 1996. The ITP authorizes the “taking” of federally protected species, incidental to beach driving and vehicular beach access-related activities regulated and/or managed by the county. The County was also required to have a Habitat Conservation Plan (HCP) as part of its application for the ITP. The HCP describes the anticipated effects of the proposed taking, how those impacts will be minimized or mitigated, and how the HCP is to be funded.

The bill allows Volusia County to permit, by ordinance, vehicular traffic upon a portion of coastal beach where vehicular traffic was not previously permitted, for the sole purpose of a low-speed reenactment of a historic automobile race on the original beach race course.

The bill does not appear to have a fiscal impact on the state. According to the Economic Impact Statement Volusia County would expend \$9,768 annually to help facilitate the event on the beach.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Present Situation

##### State Beach Regulations

Florida law<sup>1</sup> limits construction and physical activity in Florida's coastal areas, regulates how that construction and activity can occur, and provides enforcement mechanisms for violations. In the 1970s, the Legislature added provisions regulating the construction seaward of a "costal construction control line" to be established by the Department of Environmental Protection (DEP).<sup>2</sup> The purpose in adopting these provisions was to protect beaches and coastal barrier dunes from imprudent construction.<sup>3</sup>

Florida law requires DEP to establish coastal construction control lines on a county-by-county basis along the coasts of the state.<sup>4</sup> These control lines are to "be established so as to define that portion of the beach-dune system, which is subject to severe fluctuations based on 100-year storm surge, storm waves, or other predictable weather conditions."<sup>5</sup> Once a control line is established, it is unlawful to "construct any structure whatsoever seaward thereof, make any excavation, remove any beach material, or otherwise alter existing ground elevations; [or] drive any vehicle on, over, or across any sand dune or damage or cause to be damaged such sand dune or the vegetation growing thereon seaward" unless one has a permit issued by DEP.<sup>6</sup>

In 1985, the Coastal Zone Protection Act<sup>7</sup> established minimum standards governing the location of construction in coastal areas and mandated that any such construction produce the "minimum adverse impact"<sup>8</sup> on the "beach"<sup>9</sup> and "dune system."<sup>10</sup> In the Coastal Zone Protection Act, the Legislature found that coastal areas serve important aesthetic, ecological, and public health, safety, and welfare functions and have become subject to increasing growth pressures.<sup>11</sup> The minimum construction standards do not limit DEP's power to require permits or to adopt and enforce standards for construction that are more restrictive than the minimum construction standards.<sup>12</sup> The statute provides for enforcement of those minimum standards and requires sellers of coastal properties subject to the law to make certain disclosure.<sup>13</sup>

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<sup>1</sup> Ch. 161, parts I and II, F.S., known as the Dennis L. Jones Beach and Shore Preservation Act, first adopted in 1965. *See* ch. 65-408, Laws of Fla.

<sup>2</sup> S. 161.053, F.S.

<sup>3</sup> S. 161.05(1)(a), F.S.

<sup>4</sup> S. 161.053(1)(a), F.S.

<sup>5</sup> *Id.*; S. 161.053(2)(a), F.S.

<sup>6</sup> S. 161.053(2)(a), F.S.

<sup>7</sup> Ch. 161, part III, F.S.

<sup>8</sup> S. 161.55, F.S.

<sup>9</sup> "Beach" means the zone of unconsolidated material that extends landward from the mean low-water line to the place where there is marked change in material or physiographic form, or to the line of permanent vegetation, usually the effective limit of storm waves. S. 161.54(3), F.S.

<sup>10</sup> "Dune" means a mound or ridge of loose sediments, usually sand-sized sediments, lying landward of the beach and deposited by any natural or artificial mechanism. S. 161.54(3), F.S.

<sup>11</sup> S. 161.53(1)-(5), F.S.

<sup>12</sup> S. 161.56(1), F.S.

<sup>13</sup> Ss. 161.56(2) & 161.57, F.S.

## Vehicular Traffic on Beaches

Florida Statutes provide that vehicular traffic,<sup>14</sup> except that necessary for purposes such as cleanup, repair, public safety, or traffic upon authorized local or state dune crossovers, is prohibited on dunes or native stabilizing vegetation of the dune system of coastal beaches.<sup>15</sup> Except as otherwise provided in statute, any person driving any vehicle on, over, or across any dune or native stabilizing vegetation of the dune system commits a second degree misdemeanor.<sup>16</sup> On coastal beaches, vehicular traffic is prohibited except that necessary for cleanup, repair, public safety, or to maintain existing licensed and permitted traditional commercial fishing activities or existing authorized public accessways. Vehicular traffic is also permitted on a coastal beach where a local government with jurisdiction over all or portions of the beach, by at least a three-fifths vote of its governing body, has authorized such traffic prior to 1985. The local government must have determined by October 1989, in accordance with the DEP rules, that less than 50 percent of the peak user demand for off-beach parking was available.<sup>17</sup> However, these requirements do not apply to counties that have adopted unified countywide beach regulations pursuant to a county home rule charter prior to January 1, 1988.<sup>18</sup>

A local government that so authorized such vehicular traffic on all or portions of its beaches may later prohibit such vehicular traffic on all or portions of the beaches under its jurisdiction, by a vote of at least three-fifths of its governing body.<sup>19</sup> Local governments may charge a reasonable fee for vehicular traffic access, if the fee is adopted by a three-fifths vote of its governing body.<sup>20</sup> The revenues from such fees shall be used only for beach maintenance or beach-related traffic management, parking, law enforcement, liability insurance sanitation, or lifeguard or other staff purposes.<sup>21</sup> Unless authorized by the local government, any person driving any vehicle on, over, or across the beach shall be guilty of a second degree misdemeanor.<sup>22</sup>

## Best Management Practices for Operating Vehicles on the Beach

For local governments authorized to allow vehicular traffic on their beaches, the Florida Fish and Wildlife Conservation Commission (FWC) has published a best management practices for operating vehicles on the beach. The FWC advises people to avoid driving on the beach during sea turtle nesting season<sup>23</sup> (May 1 through October 31) and beach-nesting bird season (active from mid-February through the end of August).<sup>24</sup> FWC advises individuals driving on the beach to take the following precautions:

- Enter the beach only at designated access points and proceed directly to the hard-packed sand near or below the high tide line. Avoid driving on the upper beach whenever possible, and never drive over any dunes or over beach vegetation. If beach conditions require driving above the high tide line, avoid those areas with known sea turtle nests or shorebird breeding areas.

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<sup>14</sup> The term “vehicular traffic” is not statutorily defined. See *City of Treasure Island v. Tahitian Treasure Island*, 253 So. 3d 649, 657 (Fla. 2d DCA Oct. 27, 2019) (“We are confident that vehicular traffic denotes the movement of vehicles as though it were happening along a public street or highway. We reach this conclusion because the alternative—the interpretation that vehicular traffic reaches any movement of vehicles—would put section 161.58’s regulation of vehicular traffic on coastal beaches in substantial conflict with the authority granted the department in part I to authorize by permit construction and other activity on those same beaches.”).

<sup>15</sup> S. 161.58(1), F.S.

<sup>16</sup> *Id.*

<sup>17</sup> S. 161.58(2), F.S.

<sup>18</sup> S. 161.58(2)(b), F.S.

<sup>19</sup> S. 161.58(3), F.S.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Before you drive on the beach*, Florida Fish and Wildlife Conservation Commission, [myfwc.com/conservation/you-choose/wildlife/beach-driving](http://myfwc.com/conservation/you-choose/wildlife/beach-driving) (last visited Jan. 9, 2020). While May through October is considered sea turtle nesting season, some species of sea turtles have been known to nest as early as February, and hatchlings can emerge from their nests as late as the mid-winter months.

<sup>24</sup> *Id.*

- Avoid the wrack line<sup>25</sup> or areas of dense seaweed, which may contain sea turtle hatchlings or baby birds;
- Minimize ruts on the dry sandy beach by lowering tire pressure and using 4WD, particularly in front of sea turtle or bird nests;
- Drive slowly in order to observe any bird eggs, chicks, or sea turtle hatchlings in the vehicle's line of travel;
- Whenever possible, avoid driving on the beach at night;
- Do not park vehicles adjacent to nests or posted areas, and if driving at night, turn headlights off when parking; and
- If you observe a sea turtle crawling out of the surf, stop the vehicle and turn off all lights.<sup>26</sup>

### Vehicular Beach Traffic in Volusia County

Volusia County is authorized to regulate vehicular access to the county's coastal beaches.<sup>27</sup> Driving on the beaches of Daytona Beach and New Smyrna Beach in Volusia County is a tradition dating back to the early days of the automobile.<sup>28</sup> Volusia County's charter provides that the public has a right of access to the beaches and a right to use the beaches for recreation and other customary purposes.<sup>29</sup> The charter directs the county council, as permitted by law, to authorize vehicular access to any part of the beach not reasonably accessible from public parking facilities.<sup>30</sup> Daytona Beach and New Smyrna Beaches are open to vehicles from 8:00 am to 7:00 p.m. or sundown (whichever is earlier) from May 1 through October 31, and between sunrise and sunset from November 1 to April 30, tides permitting.<sup>31</sup> The driving areas are designated by signs and wooden posts and drivers are required to drive only in those designated areas, observe the speed limit of 10 miles per hour (MPH)<sup>32</sup>, and parking is allowed east, or seaward of the wooden posts.<sup>33</sup>

<sup>25</sup> Beach wrack is the line of debris that gets pushed onshore by ocean tides and is an important component in the beach/dune ecosystem. *Beach Wrack what is it?*, Discover Palm Beach, [discover.pbcgov.org/erm/Publications/BeachFactSheet.pdf](https://discover.pbcgov.org/erm/Publications/BeachFactSheet.pdf) (last visited Jan. 9, 2020).

<sup>26</sup> Florida Fish and Wildlife Conservation Commission, *supra* note 23.

<sup>27</sup> S.161.58, F.S.; *See Loggerhead Turtle v. Cnty Council of Volusia Cnty*, 896 F. Supp 1170, 1174 (M.D. Fla. 1995).

<sup>28</sup> *Beach driving and Parking*, Volusia County, [volusia.org/services/public-protection/beach-safety/beach-driving-and-parking.shtml](https://volusia.org/services/public-protection/beach-safety/beach-driving-and-parking.shtml) (last visited Jan. 8, 2020).

<sup>29</sup> VOLUSIA COUNTY FLA., CHARTER, S. 205.1 (1996), available at [Volusia.org/government/county-council/how-county-government-works/home-rule-charter-details.shtml](https://volusia.org/government/county-council/how-county-government-works/home-rule-charter-details.shtml).

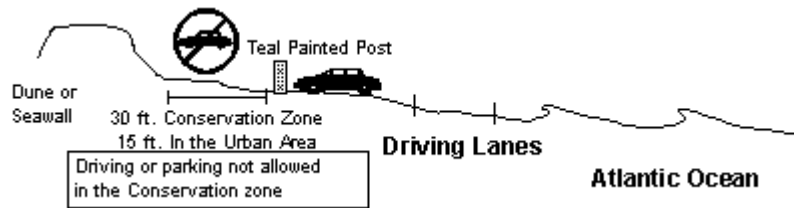
<sup>30</sup> *Id.*

<sup>31</sup> VOLUSIA COUNTY, FLA. CODE OF ORDINANCES, S. 20-173 (2015), [library.municode.com/fl/Volusia\\_county/code/code\\_of\\_ordinances?nodeID=PTIICOOR\\_CH20BECO\\_ARTVITRVE](https://library.municode.com/fl/Volusia_county/code/code_of_ordinances?nodeID=PTIICOOR_CH20BECO_ARTVITRVE) (last visited Jan. 8, 2019). Vehicular traffic is prohibited in the following areas of beach, which are established as traffic-free zones: (1) all the beach north of the northernmost boundary of the extension of Granada Avenue in Ormond Beach, from the southernmost boundary of the extension of Emelia Avenue in Daytona Beach Shores to the northernmost boundary of the extension of Beach Street in the Town of Ponce Inlet, from 100 feet north of the north jetty of the Ponce deLeon jetty southward to the southernmost limits of the Town of Ponce Inlet; north of the rock jetty along that portion of the beach boarding the south side of the Ponce deLeon Inlet channel, from the southernmost boundary of the extension of 27th Street in New Smyrna Beach south to Canaveral National Seashore Park, from the southern boundary of the extension of Seabreeze Boulevard to the northern boundary of the extension of International Speedway Boulevard, and from a point 300 feet south of the southernly extension of University Boulevard extending southward 410 feet.

<sup>32</sup> VOLUSIA COUNTY, FLA. CODE OF ORDINANCES, S. 82-49(b)(2) (2011), [https://library.municode.com/fl/volusia\\_county/codes/code\\_of\\_ordinances?nodeId=PTIICOOR\\_CH82PARE\\_ARTIIIRURECOLA\\_S82-49MOVE](https://library.municode.com/fl/volusia_county/codes/code_of_ordinances?nodeId=PTIICOOR_CH82PARE_ARTIIIRURECOLA_S82-49MOVE) (last visited Jan. 11, 2020). Vehicular traffic is limited to 10 MPH on conservation lands.

<sup>33</sup> Volusia County, *supra* note 29.

The diagram below indicates these designated areas:



Volusia County requires all persons driving on the beach to purchase either a daily or annual beach pass, which is displayed on the vehicle's windshield.<sup>34</sup> The following fees and passes are available at beach toll locations and inlet parks:

- \$20 daily beach entry per vehicle (one free re-entry/day/same vehicle)
- \$10 daily inlet park entry per vehicle at Lighthouse Point and Smyrna Dunes Park (one free re-entry/day/same vehicle)
- \$25 resident annual beach pass (unlimited beach entry- 365 days from date of purchase)
- \$20 annual inlet park pass (unlimited beach entry- 365 days from date of purchase)
- \$100 non-resident annual beach pass (unlimited beach entry- 365 days from date of purchase)
- \$45 resident combo pass (beach and inlet parks unlimited entry- 365 days from date of purchase)
- \$120 non-resident combo pass (beach and inlet parks unlimited entry- 365 days from date of purchase).<sup>35</sup>

#### The Endangered Species Act and Incidental Take Permits

The Endangered Species Act (ESA) prohibits the “taking” of listed species through direct harm or habitat destruction.<sup>36</sup> The ESA defines the term “take” to mean activities that “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.”<sup>37</sup> Congress has authorized the U.S. Fish and Wildlife Service (USFWS) (through the Secretary of the Interior) to issue permits for the “incidental taking” of endangered and threatened wildlife species.<sup>38</sup> Incidental Take Permit (ITP) holders may engage in a legal activity but that results in the “incidental” taking of a listed species.<sup>39</sup> Entities seeking an ITP are required to have a Habitat Conservation Plan (HCP) as part of the application.<sup>40</sup> The HCP describes the anticipated effects of the proposed taking, how those impacts will be minimized or mitigated, and how the HCP will be funded.<sup>41</sup> HCPs can apply to both listed and non-listed species, including those that are candidates or have been proposed for listing.<sup>42</sup> The HCP is required to meet the following permit issuance criteria of the ESA:

- The taking will be incidental;
- The applicant will, to the maximum extent practicable, minimize and mitigate the impacts of the taking;
- The applicant will ensure that adequate funding for the plan will be provided;

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> 16 U.S.C. § 1538(A)(1)(B).

<sup>37</sup> 16 U.S.C. § 1532(19).

<sup>38</sup> *Id.*; *Endangered Species Permits*, U.S. Fish & Wildlife Service, [fws.gov/Midwest/endangered/permits/hcp/index.html](https://fws.gov/Midwest/endangered/permits/hcp/index.html) (last visited Jan. 8, 2019).

<sup>39</sup> *Id.* There are no Federal prohibitions under the ESA for the “taking” of listed plants on non-Federal lands, unless taking of those plants is in violation of state law. However, before the USFWS issues a permit, the effects of the permit on listed plants must be analyzed because of section 7 of the ESA requires that issuance of a HCP permit must not jeopardize any listed species, including plants.

<sup>40</sup> Habitat Conservation Plans under the Endangered Species Act, U.S. Fish & Wildlife Service, [fws.gov/endangered/esa-library/pdf/hcp.pdf](https://fws.gov/endangered/esa-library/pdf/hcp.pdf) (last visited Jan. 8, 2020).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

- The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and
- Other measure, as required by the Secretary, will be met.<sup>43</sup>

HCP's are also required to comply with the Five Points Policy<sup>44</sup> by including:

- 1) Biological goals and objectives, which define the expected biological outcome for each species covered by the HCP;
- 2) Adaptive management, which includes methods for addressing uncertainty and also monitoring and feedback for biological goals and objectives;
- 3) Monitoring for compliance, effectiveness, and effects;
- 4) Permit duration which is determined by the time-span of the project and designed to provide the time needed to achieve biological goals and address biological uncertainty; and
- 5) Public participation according to the National Environmental Policy Act.<sup>45</sup>

The applicant or entity seeking an ITP in addition to completing a HCP must also complete a standard application form,<sup>46</sup> and Implementation Agreement (if applicable),<sup>47</sup> the application fee, and a draft National Environmental Policy Act (NEPA) analysis.<sup>48</sup> The USFWS Regional Director decides whether to issue an ITP, based on whether the HCP meets the criteria mentioned above. A 30-day period for public comments on an application for an ITP is also required.<sup>49</sup> If the HCP addresses all of those requirements, as well as those of other applicable laws,<sup>50</sup> the USFWS will issue the permit.<sup>51</sup> The elements of a HCP are made binding through the ITP. While an ITP will contain an expiration date the

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<sup>43</sup> 16 U.S.C. § 1539(a)(2)(B)

<sup>44</sup> The Five Points Policy initiative was designed to improve the HCP program to address monitoring, adaptive management, measurable biological goals, permit duration and increased public participation. *See* Agencies Focus on “No Surprises” and 5-Point Policy Initiative to Strengthen Endangered Species Conservation Partnerships, FWS.gov/pacific/news/1998/9819nr.htm (last visited Jan. 9, 2020).

<sup>45</sup> U.S. Fish & Wildlife Service, *supra* note 40; The National Environmental Policy Act (NEPA), codified as 42 U.S.C. § 4321, was enacted to assure that all branches of government give proper consideration to the environment prior to undertaking any major federal action that significantly affects the environment. NEPA requirements are invoked when airports, buildings, military complexes, highways, parkland purchases, and other federal activities are proposed. Environmental Assessments (EAs) and Environmental Impact Statements (EISs), which are assessments of the likelihood of impacts from alternative courses of action, are required from all Federal agencies and are the most visible NEPA requirements. *See Summary of the National Environmental Policy Act*, United States Environmental Protection Agency, epa.gov/laws-regulations/summary-national-environmental-policy-act (last visited Jan. 9, 2020).

<sup>46</sup> *Federal Fish and Wildlife Permit Application Form*, U.S. Fish and Wildlife Service (Oct. 2017), fws.gov/forms/3-200-56.pdf (last visited Jan. 9, 2019).

<sup>47</sup> Implementing agreements are made between the permit applicant and the USFWS to assure that the permit applicant will follow through on their obligation to implement the mitigation plan identified by the HCP. Elements of an Implementation Agreement include: a definition of the obligations and benefits of all signatories and other parties to the HCP; assignment of responsibilities for implementing HCP measures; and specific monitoring requirements for USFWS. Implementing agreements are no longer mandatory for all HCPs, such as a low-effect HCP (minor or negligible effects of federally listed, proposed or candidate species and their habitats), unless specifically required by the permit applicant. In other HCPs, the development of the implementing agreement will depend on the size and scope of the HCP and is left to the discretion of the FWS's Regional Director or the National Marine Fisheries Service Regional Administrator. Implementing agreements are recommended for regional or other large-scale HCPs that address significant portions of a species' range or involve numerous activities or landowners, or for HCPs with long-term mitigation and monitoring programs. *See* Final Handbook for Habitat Conservation Planning and Incidental Take Permitting Process, Federal Register (Dec. 2, 1996), available at govinfo.gov/content/pkg/FR-1996-12-02/pdf/96-30610.pdf.

<sup>48</sup> U.S. Fish & Wildlife Service, *supra* note 40. An NEPA analysis may result in a categorical exclusion, an environmental assessment, or an environmental impact statement.

<sup>49</sup> *Id.* In addition, because NEPA requires public comment on certain documents, the USFWS operates the two comment periods concurrently. Generally, the comment period is 30 days for a low-effect HCP, 60 days for an HCP that requires an environmental assessment, and 90 days for an HCP that requires an environmental impact statement. The USFWS considers public comments in permit decisions.

<sup>50</sup> *Id.* USFWS complies with the requirements of NEPA and all other statutes and regulations, including state and local environmental/planning laws.

<sup>51</sup> *Id.*

mitigation identified in the HCP can be permanent in certain cases.<sup>52</sup> USFWS policy assures state and private landowners that if unforeseen circumstances arise the USFWS will not require a commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water; or other natural resources beyond the level agreed to in the HCP without the consent of the permit holder.<sup>53</sup>

Once an ITP is issued the permit holder is responsible for ensuring all required monitoring.<sup>54</sup> The ESA or any party designated as responsible in the HCP, such as the state wildlife agency or a local government, will monitor the project for compliance with the terms of the ITP and HCP.<sup>55</sup> Monitoring plans for HCPs should establish target milestones, to the extent practicable, or reporting requirements throughout the life of the HCP.<sup>56</sup> The USFWS reviews the monitoring reports and coordinates with the ITP holder if any action is needed.<sup>57</sup> Violations of the terms of an ITP result in an “illegal taking” under section 9 of the ESA.<sup>58</sup>

### Volusia County's Incidental Take Permit

Although a lawful and traditional activity in Volusia County, beach driving has the potential to impact sea turtles and their nesting habitat as well as the critical wintering habitat of the federally threatened piping plover.<sup>59</sup> Additionally, the Southeastern Beach Mouse historically lived on barrier islands from Palm Beach County north to Ponce Inlet in Volusia County.<sup>60</sup> In 2001, the USFWS designated 168 acres in the Ponce Inlet area as critical habitat for wintering piping plovers.<sup>61</sup> Operating vehicles on the beach can destroy wildlife habitats and can be harmful or fatal to wildlife.<sup>62</sup> Three species of sea turtles regularly nest on Volusia County beaches: the Loggerhead, Green, and Leatherback, while two others

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<sup>52</sup> *Habitat Conservation Plans Section 10 of the Endangered Species Act*, U.S Fish & Wildlife Service, [fws.gov/Midwest/endangered/permits/hcp/hcp\\_wofactsheet.html](https://fws.gov/Midwest/endangered/permits/hcp/hcp_wofactsheet.html) (last visited Jan. 9, 2020).

<sup>53</sup> *Habitat Conservation Plans: Frequently Asked Questions*, U.S. Fish & Wildlife Service, [fws.gov/endangered/what-we-do/hcp-faq.html](https://fws.gov/endangered/what-we-do/hcp-faq.html) (last visited Jan. 9, 2019).

<sup>54</sup> U.S. Fish & Wildlife Service, *supra* note 40.

<sup>55</sup> See U.S Fish & Wildlife Service, *supra* note 52. If another party is responsible for monitoring compliance with the permit, the USFWS will require periodic reporting from such party in order to maintain overall oversight responsibility for the implementation of the HCP's terms and conditions. For regional and other large-scale or long-term HCPs, monitoring programs must provide long-term assurances that the HCP will be implemented correctly, that actions will be monitored, and that such actions will work as expected. This should include periodic accountings of take, surveys to determine species statuses in project areas or mitigation habitats, and progress reports on fulfillment of mitigation requirements (e.g. habitat acres acquired).

<sup>56</sup> *Id.*

<sup>57</sup> U.S. Fish & Wildlife Service, *supra* note 53.

<sup>58</sup> U.S Fish & Wildlife Service, *supra* note 52. Any person who knowingly violates a provision of an issued permit may be assessed a civil penalty by the Secretary of not more than \$25,000 for each violation. Any person who otherwise violates a permit may be assessed a civil penalty by the Secretary of not more than \$500 for each such violation. Each violation shall be a separate offense. See 16 U.S.C. § 1540(a)(1). Any person who knowingly violates any permit shall, upon conviction, be fined not more than \$50,000 or imprisoned for not more than one year, or both. See 16 U.S.C. § 1540(b)(1). The head of any Federal agency which has issued a permit may immediately modify, suspend, or revoke each permit or other agreement. See 16 U.S.C. § 1540(b)(2). If the FWS deems the violation as technical or inadvertent it may send the permit holder a notice of noncompliance or may recommend alternative actions so that the permit holder may regain compliance with the terms of the ITP.

<sup>59</sup> *Habitat Conservation Plan: A plan for the protection of sea turtles on the beaches of Volusia County, Florida*, Ecological Associates, Inc., (Nov. 2016- last revised June 2008), [volusia.org/core/fileparse.php/6466/urlt/HCB.pdf](https://volusia.org/core/fileparse.php/6466/urlt/HCB.pdf) (last visited Jan. 9, 2020). The piping plover is a small, highly mobile, beach-dwelling bird of the plover family. The Atlantic Coast population was listed as threatened by the USFWS in 1986 (50 FR 50726-50734). The piping plover is also protected under Federal regulations through the Migratory Bird Treaty Act (MTBA) of 1918.

<sup>60</sup> *Id.* The Southeastern Beach mouse was afforded Federal protection as a threatened species in 1989 (53 FR 20598-20602).

<sup>61</sup> *Id.*; See 50 C.F.R. 17.

<sup>62</sup> Florida Fish and Wildlife Conservation Commission, *supra* note 23. The eggs and flightless young of beach-nesting birds can be virtually invisible, especially from a vehicle. Sea turtles coming ashore to nest may be scared away by vehicles and hatchlings are vulnerable to being run over. Both adult and hatchling sea turtles can be disoriented by any form of artificial light, including headlights. Ruts made by vehicles can trap and disorient turtle hatchlings and baby birds.

are rare nesters, the Hawksbill and Kemp's Ridley.<sup>63</sup> Because these impacts qualify as prohibited "takings" under the ESA, Volusia County applied for an ITP in February 1996 to authorize the taking incidental to beach driving and vehicular beach access-related activities regulated and/or managed by the county.<sup>64</sup> A corresponding HCP was prepared and submitted to the USFWS as part of the permitting process. After public comments an ITP was issued to Volusia County on November 22, 1996. The ITP was amended 11 times, the most recent of which extended its expiration term until December 31, 2030.<sup>65</sup>

Between 1997 and 2001, only six sea turtle hatchlings were reported to have been directly impacted and one unmarked nest was reportedly run over by a public safety vehicle. Indirect impacts to sea turtles have been limited primarily to hatchling encounters with vehicle ruts. However, there is no evidence to suggest that vehicular activity has affected either nesting success (the percentage of turtle crawls resulting in nests) or hatchling productivity.<sup>66</sup> In 2018, there were 2,167 Loggerhead nests, 142 Green nest, and 11 Leatherback nests, in Volusia County<sup>67</sup>

The HCP plan area encompasses the entire Volusia County coastline from the Flagler/Volusia County Line to the Volusia/Brevard County Line, including the sandy beaches bordering the Ponce De Leon Inlet.<sup>68</sup> Under the HCP, vehicles used for emergency responses, public safety, or engaged in activities necessary to implement the terms and conditions of the ITP are allowed unlimited access to all county beaches and may access other beaches within the Plan Area in support of public safety operations, if requested.<sup>69</sup> Vehicles involved in sanitation, beach maintenance, and permitted coastal construction projects may also access all areas, but under specific constraints governing access times, access locations and operating procedures.<sup>70</sup> With few exceptions, concessionaires, commercial fishermen, and the general public may only access certain areas of the beach and only during daylight hours.<sup>71</sup>

The HCP segregated turtles from vehicles through four basic mechanisms:

- Public access is limited to daylight hours and public safety vehicles that operate at night must follow specific guidelines;
- Public driving is limited primarily to those areas where nest densities are lowest;
- In those areas where public driving is permitted, all driving and parking must occur outside a marked Conservation Zone near the dune, where the majority of nests are typically deposited; and
- All nests are conspicuously marked so they can be avoided.<sup>72</sup>

### Legends Beach Parade

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<sup>63</sup> *Id.* The Loggerhead turtle, was federally listed on July 28, 1978 as a threatened species under the USA (43 FR 32800), the Green turtle in Florida and on the Pacific Coast of Mexico was federally listed as endangered in 1978 (43 FR 32800), the leatherback turtle was federally listed as an endangered species in 1970 (35 FR 8491), the Hawksbill turtle was federally listed as endangered in 1970 (35 FR 8491), and the Kemp's Ridley sea turtle was listed as endangered under U.S. law in 1970 (35 FR 18320).

<sup>64</sup> Ecological Associates, Inc., *supra* note 60.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> 2018 *Statewide Nesting Totals*, Florida Fish and Wildlife Conservation Commission, [myfwc.com/research/wildlife/sea-turtles/nesting/statewide](http://myfwc.com/research/wildlife/sea-turtles/nesting/statewide) (last visited Jan. 9, 2020).

<sup>68</sup> Ecological Associates, Inc., *supra* note 60. The HCP is bounded on the east by the mean low water line and on the west by the bulkhead line or line of permanent vegetation. Within the plan area, the County exercises regulatory authority over those 35.6 miles of beaches extending from the southern boundary of the North Peninsula State Recreation Area (NPSRA) to the northern boundary of the Canaveral National Seashore (CNS).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* Additionally, the posting and enforcement of a 10 miles per hour speed limit for vehicles on the beach and the placement of signs warning drivers to look out for wildlife reduces the potential for collisions with the resting plovers. An annual winter census of piping plovers within the federally designated Critical Habitat is conducted to determine the extent of the habitat utilization by the bird species on county beaches.



Before Daytona International Speedway opened in 1959 stock car racing in Volusia County occurred primarily on Daytona Beach and Ormond Beach.<sup>73</sup> In 2013, the first reenactment of a historic beach race occurred, called the Legends Beach Parade, which was conducted annually at the North Turn Beach from 2013 - 2018.<sup>74</sup>

### Effect of Proposed Changes

The bill allows Volusia County by ordinance to allow vehicular traffic on its beaches for the sole purpose of reenacting the historic beach race, upon a portion of coastal beach, where vehicular traffic has not previously been permitted.<sup>75</sup>

#### B. SECTION DIRECTORY:

Section 1: Provides an exemption from s.161.58, F.S., to allow Volusia County by ordinance to allow vehicle traffic on areas of the beach currently closed to vehicular traffic for the sole purpose of reenacting a historical beach race.

Section 2: Provides the act is effective upon becoming law.

### II. NOTICE/REFERENDUM AND OTHER REQUIREMENTS

A. NOTICE PUBLISHED? Yes ☒ No ☐

IF YES, WHEN? November 12, 2019

WHERE? The *News-Journal*, a daily newspaper of general circulation published in Volusia County, Florida.

B. REFERENDUM(S) REQUIRED? Yes ☐ No ☒

IF YES, WHEN?

C. LOCAL BILL CERTIFICATION FILED? Yes ☒ No ☐

D. ECONOMIC IMPACT STATEMENT FILED? Yes ☒ No ☐

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

The bill neither requires nor provides authority for agency rulemaking.

C. DRAFTING ISSUES OR OTHER COMMENTS:

<sup>73</sup> *Florida Frontiers* "Racing on the Beach," The Florida Historical Society, [myfloridahistory.org/frontiers/article/131](http://myfloridahistory.org/frontiers/article/131) (last visited Jan. 9, 2020).

<sup>74</sup> Casmira Harrison, *Volusia lawmakers to back Legends Beach Parade law*, Daytona Beach News-Journal (Nov. 20, 2019), <https://www.news-journalonline.com/news/20191120/volusia-lawmakers-to-back-legends-beach-parade-law> (last visited Jan. 9, 2020). According to the Economic Impact Statement, vehicles will travel at speeds of 5 to 10 MPH.

Attached in Appendix A is a map of the reenactment route.

The bill does not specify which beaches a reenactment of a historic automobile race event may occur.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

None.

## Appendix A

